

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
NFL Enterprises LLC,	)	MB Docket No. 08-214
Complainant	)	File No. CSR-7876-P
v.	)	
Comcast Cable Communications, LLC,	)	
Defendant	)	
To: Marlene H. Dortch, Secretary		
Federal Communications Commission		
Attn: Richard L. Sippel		
Chief Administrative Law Judge		

**DEFENDANT’S MOTION OPPOSING  
THE TAKING OF DEPOSITIONS**

Defendant Comcast Cable Communications, LLC (“Comcast”) hereby moves pursuant to 47 CFR 1.319(a) to object to the taking of the depositions of Brian L. Roberts, Stephen B. Burke and Madison Bond noticed by Complainant NFL Enterprises LLC (the “NFL”) on March 11, 2009, and respectfully requests that the Presiding Judge order that those depositions not be taken.

**PRELIMINARY STATEMENT**

This motion illustrates well how the central issue in this case is not whether a programmer (the NFL) is being discriminated against, but rather whether a programmer who is a powerful monopolist should be treated as if it is above the market and the law. In 2004, the NFL negotiated a carriage agreement with Comcast that was arms’ length and market driven. The NFL Network was a start-up at the time and its programming was quite limited. But it was able to draw on the NFL’s strength as a sports monopoly to negotiate an agreement giving it broad cable distribution, distribution that another network start-up, not affiliated with an established monopoly power like the NFL, would not have been able to acquire. The NFL Network enjoyed

the benefits of that contract for years, but then, during the contract's term (which expires in April of this year), the NFL sought to rewrite the 2004 deal by bringing this action seeking to impose new terms. The NFL's position is essentially that because it is the NFL, and has been allowed to function as a monopoly to create programming with a limited supply which it controls, it should be allowed to disregard the normal laws of contract and market pricing.

This attitude of special entitlement, allowing the NFL to disregard laws and agreements that bind the rest of us, has also been on display in the NFL's approach to litigation. In previous filings in this matter, Comcast submitted the declarations of the three executives the NFL is seeking to depose again, including the CEO of Comcast Corporation, Brian Roberts. The NFL recently took the depositions of all three witnesses, each available for a full day, during which NFL counsel was permitted to ask broad ranging questions, including questions concerning the subject matter of the declarations. The depositions were noticed by the NFL in the related New York contract actions, not this matter, and the NFL had previously sought a ruling in that action restricting Comcast counsel from questioning NFL witnesses about issues solely relevant to this matter. But Comcast did not seek to limit the NFL's questioning of its witnesses, and indeed during the depositions of the three Comcast declarants, Comcast's counsel even noted on the record that it was permitting the NFL broad range to question about FCC issues. But, as it had done with the 2004 contracts themselves, after the NFL enjoyed the benefits of its unrestricted deposition examinations of the witnesses, it asked to rewrite events by taking the depositions again. When asked to identify any areas of questioning that the NFL had not been able to cover the first time, the NFL took the position that it does not have to justify the topics in advance – and repeated its demand that it be allowed to question the witnesses again.

We respectfully request that the Presiding Judge not permit the NFL a second bite at the apple and that absent good cause shown for questioning not covered before, the NFL not be permitted to inconvenience these witnesses by forcing them to sit for a second deposition day. Comcast has not sought to redepose the NFL's witnesses and there is no reason why the NFL should be entitled to more favorable treatment. The normal rules of fairness and efficiency that apply to other litigants should apply equally to the NFL (despite the monopoly position it enjoys) and the fact that it has been unable to support its claims through the depositions already taken is not grounds for allowing it a another chance.

### **BACKGROUND**

The parties have discussed both the possibility of Comcast further deposing NFL witnesses deposed in the related litigation initiated by the NFL in New York State court (the "New York Actions"), and of the NFL taking the depositions of Comcast witnesses already deposed in the New York Actions. The NFL questioned the need for additional depositions of NFL witnesses. Similarly, Comcast has taken the position that the NFL already examined Comcast's witnesses extensively in the New York Actions, where Comcast gave the NFL free reign in its questioning, and that further depositions of Comcast witnesses are unwarranted.

During the parties' continuing discussions of the issue, Comcast repeatedly has expressed concern that the NFL is seeking a second set of depositions of Comcast witnesses in order to impose on the time of high-ranking Comcast executives. Comcast also asked the NFL to identify the topics that it did not cover in the prior depositions that it would cover in second depositions, and how much time the NFL was requesting for each witness. At no time in the parties' discussions did Comcast state (or suggest) that it was in the process of scheduling dates for the witnesses.

In response, the NFL has proposed to use 12 hours for all three witnesses combined, and refused to limit the topics of examination meaningfully. The NFL said it is not willing to limit topics, other than to state vaguely that it will not repeat topics covered in the New York Actions, that it will not use documents about which the witnesses already have been asked, and that its questioning will concern the witnesses' FCC declarations and the NFL's "core allegations." Comcast believes that the NFL's hazy and largely non-committal proposal does nothing to justify the depositions and, to the contrary, reinforces the suspicion that the depositions are being requested to harass senior executives of Comcast and its parent company.

On March 11th, the NFL noticed second depositions of Mr. Bond for March 23rd, of Mr. Burke for March 25th, and Mr. Roberts for March 26th.

### **ARGUMENT**

The NFL's request to depose Comcast witnesses for a second time is unwarranted and an attempt to harass those senior executives and impose on their time. The Presiding Judge has ordered "tight, not expansive discovery, very focused discovery on a tight schedule."<sup>1</sup> For its part, the NFL consistently has insisted that it does not need depositions of fact witnesses:

"[I]f the proposal is that we'll submit their testimony in advance, that there will be a declaration or a verified statement . . . there's no need for deposition[s] because there's no mystery about what the witness is going to testify to, what he's going to say."<sup>2</sup>

"Given the nature of the narrow issues that remain to be resolved, there is no need for extensive document discovery or for depositions of fact-based witnesses."<sup>3</sup>

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<sup>1</sup> Prehearing Conference Tr. at 104 (Nov. 25, 2008).

<sup>2</sup> Prehearing Conference Tr. at 86 (Nov. 25, 2008).

<sup>3</sup> NFL Enterprises LLC's Status Report at 2 (Jan. 7, 2009).

“Our position is that there is no need for depositions of fact witnesses.”<sup>4</sup>

The NFL supported this position by arguing that “[i]n the related litigation Comcast has already had a deposition of our principal fact witness at the hearing.”<sup>5</sup>

The NFL’s insistence that it does not need depositions of fact witnesses begs the question of why the NFL is now seeking depositions of high-ranking Comcast executives that it already has deposed extensively in the New York Actions – and reinforces the conclusion that the NFL seeks the depositions as a tactic to harass those executives. Tellingly, the NFL revealed, through an argument that the Presiding Judge accurately interpreted as a threat to “get even” if Comcast noticed depositions, that the NFL views depositions as a tool for harassment.<sup>6</sup> The NFL’s complete reversal of its position on fact depositions is a dead giveaway that the NFL’s deposition notices are intended to harass the senior executives of Comcast and its parent company.

While Comcast argued in favor of fact depositions, it did not argue for second depositions of witnesses that already had been deposed in the New York Actions. For example, Comcast argued that “we do think there’s need for fact depositions, particularly in the NFL and MASN cases where there’s lots of issues about that went on with negotiations.”<sup>7</sup> But Comcast’s arguments do not support second depositions of Mr. Roberts, Mr. Burke or Mr. Bond, who were extensively examined in the New York Actions, including about the parties’ negotiations.

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<sup>4</sup> Prehearing Conference Tr. at 226 (Jan. 29, 2009).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 234.

<sup>7</sup> Prehearing Conference Tr. at 103 (Nov. 25, 2008).

In discussions with Comcast regarding the NFL's request for second depositions, the NFL has invoked a December 4, 2008 ruling in the New York Actions that questioning relating *solely* to this FCC proceeding would not be permitted in that litigation, while acknowledging the appropriateness of questioning regarding the multitude of issues common to both the New York Actions and this FCC proceeding.<sup>8</sup> An exchange of correspondence between the parties concerning the scope of that oral ruling indicates that both parties interpreted the ruling narrowly.<sup>9</sup>

The NFL's reliance on that ruling is a red herring for at least two reasons. First, the ruling was no bar to the NFL asking about any of the large number of overlapping issues – including the parties' negotiations over a carriage deal in 2003-2004, the parties' negotiations over the possibility of Versus (then known as the Outdoor Life Network) obtaining the rights to telecast the Thursday/Saturday games package, and Mr. Roberts' statements regarding Comcast's contractual right to distribute the NFLN on a sports tier (which the NFL mischaracterizes in this proceeding as "threats"), among many other issues.

Second, Comcast allowed the NFL free reign in the New York Actions in the NFL's questioning of Comcast witnesses who have submitted declarations in this FCC proceeding. Indeed, in Mr. Burke's deposition in the New York Actions, counsel for Comcast expressly informed counsel for the NFL:

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<sup>8</sup> The NFL sought that ruling from the New York court based on a mischaracterization of this proceeding – namely that "[t]he presiding FCC Administrative Law Judge has not allowed deposition discovery of fact witnesses in that proceeding." Exhibit A (letter from C. William Phillips to the Honorable Bernard J. Fried, dated Dec. 4, 2008).

<sup>9</sup> See Exhibit B (letter from C. William Phillips to David B. Toscano, dated Dec. 10, 2008); Exhibit C (letter from David B. Toscano to C. William Phillips, dated Dec. 15, 2008).

“[I]’m going to let this [question] go although it has no connection to the New York suit. But just note that in exchange for your breadth of questioning here I expect to have a similar accommodation when we’re questioning your witnesses. And I’ll take the breadth of your questioning now as being a waiver of arguments you were previously making that the questioning should somehow be restricted to issues in the New York proceeding.”<sup>10</sup>

Because the NFL was not restricted in its questioning, there is no need for the NFL to depose a witness twice.

In discussions between the parties, the NFL has accused Comcast of seeking to engage in “unilateral discovery.” The NFL bases that spurious charge on the argument that Comcast marked the FCC declarations of two NFL witnesses in their depositions, but the NFL did not mark the FCC declarations of Comcast witnesses. But this example cuts the other way, because the NFL blocked Comcast from freely examining one NFL witness about his declaration,<sup>11</sup> whereas the NFL had the opportunity to mark Comcast witnesses’ FCC declarations, had the opportunity to ask about everything in the declarations, and in fact asked about most, if not all, of the matters in the declarations.

The potential imposition on the time of Comcast’s senior executives – who maintain busy schedules which book significantly in advance – is increased because the NFL served its deposition notices only 12 to 15 days before the depositions it seeks. The Presiding Judge reminded the parties that the rules require a party seeking depositions to notice them,<sup>12</sup> and those rules provide that notices provide “a minimum of 21 days notice.”<sup>13</sup> The NFL has stated to

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<sup>10</sup> Exhibit D (deposition of Stephen B. Burke at 31 (Jan 21, 2009)).

<sup>11</sup> Exhibit E (deposition of Ronald Furman at 261-63 (Jan. 23, 2009)).

<sup>12</sup> Prehearing Conference Tr. at 236-37 (Jan. 29, 2009).

<sup>13</sup> 47 C.F.R. § 1.315(a).

Comcast that it delayed serving the notices because the parties were supposedly discussing dates, but Comcast has never suggested to the NFL that it was trying to schedule the depositions, and was instead resisting the depositions as an unwarranted imposition on the witnesses' time. And although the NFL has offered to be flexible regarding scheduling of the requested depositions, the notices were served just 16 days before the discovery cutoff, inherently limiting flexibility.

Finally, in the event that the Presiding Judge determines that second depositions are appropriate, then Comcast should be entitled to a second deposition – in addition to the depositions already taken or scheduled in the New York Actions – of each NFL witness (Paul Tagliabue, Frank Hawkins and Ronald Furman). Comcast did not notice second depositions of those NFL witnesses because it has does not believe that second depositions are appropriate. But if the Presiding Judge disagrees, then fairness requires that Comcast be able to take second depositions too.

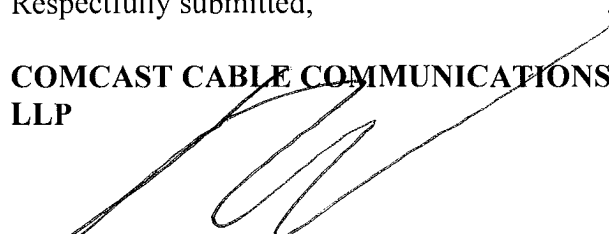


## **CONCLUSION**

For these reasons, Comcast respectfully requests that the Presiding Judge order that the depositions of Brian L. Roberts, Stephen B. Burke and Madison Bond noticed by the NFL on March 11, 2009 not be taken. Alternatively, in the event that the Presiding Judge concludes that second depositions are appropriate, Comcast respectfully requests that the Presiding Judge permit it to take second depositions of NFL witnesses.

Respectfully submitted,

**COMCAST CABLE COMMUNICATIONS,  
LLP**



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Its Attorneys

Dated: March 17, 2009

**CERTIFICATE OF SERVICE**

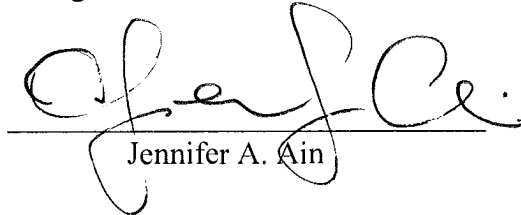
I, Jennifer A. Ain, hereby certify that, on March 17, 2009, copies of the attached Defendant's Motion Opposing the Taking of Depositions were served by e-mail on the following individuals:

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Jennifer A. Ain

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# **Exhibit A**

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December 4, 2008

## BY HAND DELIVERY & ELECTRONIC FILING

The Honorable Bernard J. Fried  
Supreme Court of the State of New York  
County of New York  
60 Centre Street, Courtroom 248  
New York, New York 10007

Re: *NFL Enters. LLC v. Comcast Cable Commc'ns, LLC*, No.  
603469/06; *Comcast Cable Commc'ns, LLC v. NFL Enters. LLC*,  
No. 604092/07

Dear Justice Fried:

We represent NFL Enterprises LLC ("Enterprises"). We write pursuant to Commercial Division Rule 14 to request a conference in order to address two unresolved discovery disputes between Enterprises and Comcast Cable Communications, LLC ("Comcast"). As the parties have a status conference scheduled for today, December 4, 2008, we respectfully request the opportunity to address these discovery disputes at that conference.

First, Enterprises intends to seek a protective order pursuant to CPLR Section 3103 to preclude further attempts by Comcast to take deposition discovery in this lawsuit on matters that are potentially relevant, if at all, only to disputes at issue in the separate proceeding currently pending before the Federal Communications Commission ("FCC"). The presiding FCC Administrative Law Judge has not allowed deposition discovery of fact witnesses in that proceeding. Comcast seeks to circumvent its inability to obtain deposition discovery there by seeking FCC-related discovery here. Comcast counsel has acknowledged that the purpose of some lines of inquiry in depositions of Enterprises witnesses in this action has been to explore issues that are exclusively the subject of the FCC proceeding.

Second, we respectfully request that the Court address Comcast counsel's failure to provide dates for the depositions of Comcast witnesses, especially its chairman Brian Roberts and a document custodian, for which we provided notice on October 29, 2008. The only witnesses who have been deposed thus far have been witnesses provided by Enterprises; indeed, yesterday Comcast took the deposition of the Commissioner of the National Football League. Mr. Roberts is an important witness in this case but, notwithstanding repeated requests, Comcast

The Honorable Bernard J. Fried  
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has not provided a date for his deposition, and Comcast's Objections to NFL's Notice of Deposition, dated November 13, 2008, are without merit.

We explain these positions further below.

**1. Protective Order.** Your Honor is aware that there is an adversarial proceeding between Enterprises and Comcast currently pending before the FCC, captioned In the matter of NFL Enterprises LLC v. Comcast Cable Communications, LLC, FCC File No. CSR 7876 P (the "FCC Proceeding"). The central issue in that dispute is whether Comcast unlawfully discriminated against the NFL Network in violation of Section 616 of the Communications Act of 1934, as amended, and the FCC's rules implementing that statute, 47 C.F.R. § 76.1300 *et seq.*, by treating the sports networks that Comcast owns (Versus and the Golf Channel) more favorably than it treats the NFL Network. The FCC Administrative Law Judge presiding over that dispute has set forth an expedited schedule that includes document discovery but does *not* allow deposition discovery of fact witnesses.

Comcast is attempting to use discovery in this litigation as an end-run around the limitations on discovery in the FCC Proceeding. For example, during the deposition of Brian J. Rolapp on November 21, 2008, David Toscano, counsel for Comcast, sought testimony on issues that are irrelevant to the matters before this Court. In response to Enterprises counsel's objection on relevance grounds, Mr. Toscano asserted: "I think it's clear from your papers in the FCC that you think that the issues in [the FCC] case implicate the contract in these cases and these questions are directly relevant to those issues." Rolapp Dep. 209:8-12, Nov. 21, 2008. Enterprises counsel objected, "But this isn't discovery in the FCC proceeding." *Id.* at 209:13-14. Mr. Toscano further insisted:

"That's exactly right. And what I have just said was that your papers in the FCC have made it clear that the NFL has taken the position that violation of the statutes and regulations at issue there also constitute a breach of contract, and on that basis we are entitled to this discovery."

*Id.* at 209:17-23.

Mr. Toscano plainly misstates the position that we have taken in this litigation. All that we have said -- as clearly stated in our Answer to Comcast's Second Amended Complaint -- is that a determination in the FCC Proceeding that Comcast has discriminated against the NFL Network will preclude Comcast from exercising certain rights asserted by Comcast in the matters before this Court: "If the FCC concludes that some or all of Comcast's actions were barred in whole or in part, some or all of the contract rights asserted by Comcast in this proceeding may be unenforceable." *See* Answer to Second Amended Compl., Fourteenth Defense, Oct. 27, 2008. While the outcome of that determination might affect the validity of the contract in dispute here, the issue to be decided on the merits in the FCC Proceeding -- i.e., whether Comcast

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December 4, 2008  
Page 3

discriminated in violation of law against Enterprises -- is not at issue in this litigation. Comcast is not entitled to deposition discovery here on matters solely relevant to the FCC Proceeding.

It is plainly within the power of this Court to grant a protective order shielding Enterprises from irrelevant and unreasonably annoying deposition discovery. CPLR Section 3101 does not entitle parties to seek irrelevant information, and CPLR Section 3103 empowers the Court to issue a protective order "denying, limiting, conditioning or regulating the use of any disclosure device," in order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." This Court has broad discretion in supervising pretrial disclosure of information. *E.g.*, Stambovsky v. Reiner, 145 A.D.2d 309, 310 (N.Y. App. Div. 1st Dep't 1988), and at least one New York court has recognized that where deposition discovery is irrelevant and is being sought for use in a parallel proceeding, it is appropriate to deny disclosure. *See Youngquist v. Youngquist*, 2007 NY Slip Op 8216, 1 (N.Y. App. Div. 2d Dep't 2007). *Cf. In re Estate of Louisiana Brown*, 141 Misc. 805, 807 (N.Y. Sur. Ct. 1931) ("This court is in accord with the proposition that discovery proceedings may not be resorted to for the purpose of seeking evidence to be used in other proceedings.").

Further, Comcast's attempt to use discovery in this litigation to circumvent the limitations on discovery in the FCC Proceeding violates the terms of the Stipulation and Order Governing the Protection and Exchange of Confidential Information (Protective Order) entered by this Court. *See* Protective Order ¶ 4, Jul. 24, 2008. That Order provides that discovery material designated thereunder may be used "only for purposes of this Litigation and for no other purposes." *Id.* Comcast counsel's examination of information under this Stipulation and Order for use in the FCC Proceeding is inappropriate and in violation of the Stipulation and Order.

Comcast should not be allowed to abuse discovery in this Court in order to circumvent a limitation that has been imposed in the FCC Proceeding. Because CPLR Section 3101 does not entitle Comcast to deposition discovery that is, at best, potentially relevant solely to the FCC Proceeding, and because such irrelevant lines of inquiry here constitute an unreasonable annoyance under CPLR Section 3103, we will ask the court to issue a protective order pursuant to CPLR Section 3103 in order to preclude further discovery abuses by Comcast counsel.

**2. Deposition Scheduling.** On October 29, 2008, we served notices of deposition for several Comcast witnesses, including its chairman Brian Roberts and a Comcast officer or employee with knowledge of Comcast's document policies for documents relevant to the above-referenced matters. Enterprises has in good faith worked to provide dates for the depositions of witnesses noticed by Comcast, including NFL Commissioner Roger Goodell, who was deposed on December 2, 2008, during an extremely busy period of the NFL season.

The Honorable Bernard J. Fried  
December 4, 2008  
Page 4

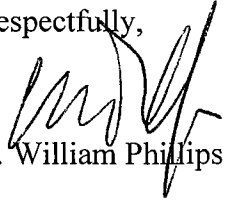
Mr. Roberts is a key witness in matters before this Court. During his deposition, NFL Commissioner Goodell was examined at length about various discussions that he had with Mr. Roberts, yet Comcast refuses to provide a date for Enterprises to depose Mr. Roberts.

Comcast's Objections to NFL's Notice of Deposition, dated November 13, 2008, are without merit. Enterprises is entitled to explore Comcast's document retention, collection, and production practices as they relate to the facts at issue in this particular case. Information pertaining only to Comcast's "general document retention policies, procedures and practices" does not suffice.

We respectfully request that the Court address Comcast's failure to provide deposition dates for key witnesses noticed by Enterprises at our upcoming conference. Although both sides have pending schedule requests to the other, the only witnesses to have been deposed thus far are from Enterprises. Comcast should be required to provide dates for the depositions of its chief executive as well as its document custodian.

We will be pleased to address these issues during our conference before the Court.

Respectfully,



C. William Phillips

cc: Michael P. Carroll, Esq.

# **Exhibit B**



# COVINGTON & BURLING LLP

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December 10, 2008

## BY E-MAIL & FIRST CLASS MAIL

David B. Toscano  
Davis Polk & Wardwell  
450 Lexington Avenue  
New York, NY 10017

Re: *NFL Enters. LLC v. Comcast Cable Commc'ns, LLC*, No.  
603469/06; *Comcast Cable Commc'ns, LLC v. NFL Enters. LLC*,  
No. 604092/07

Dear David:

We write to confirm the parties' understanding of Justice Fried's December 4, 2008 order regarding the scope of deposition discovery. Justice Fried explicitly acknowledged that the parties cannot take discovery solely relevant to the FCC proceeding. In so doing, the judge limited the scope of future deposition discovery in two respects.

First, the parties are barred from asking questions regarding the *current or aggregate* value of the NFL Network. This is to be distinguished from (a) the value of NFL Network programming during the time the August 11, 2004 and July 28, 2006 agreements were being negotiated, and as it relates to the Patriots-Giants game of December 29, 2007, and (b) the value of individual affiliation agreements (*e.g.*, net effective rates with individual affiliates); questions regarding the value of the Network in these two contexts are permitted.

Second, the parties can no longer ask questions regarding equity interests, or offers of equity, in the NFL Network.

Yours sincerely,



C. William Phillips

# **Exhibit C**

**DAVIS POLK & WARDWELL**

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FAX 212 450 3800

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DAVID B. TOSCANO  
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December 15, 2008

Re: NFL Enters., LLC v. Comcast Cable Commc'ns, LLC,  
Index No. 603469/2006

Comcast Cable Commc'ns, LLC v. NFL Enters., LLC,  
Index No 604092/2007

Via Electronic Mail

Mr. C. William Phillips  
Covington & Burling LLP  
The New York Times Building  
620 Eighth Avenue  
New York, New York 10018

Dear Will:

We write in response to your letter dated December 10, 2008 concerning Justice Fried's rulings during the December 4th teleconference regarding the scope of deposition discovery.

We agree, as we agreed with Justice Fried during the teleconference, that the parties cannot take discovery that is relevant solely to the FCC proceeding. But, as discussed, the issues in these actions overlap with those in the FCC proceeding, and Justice Fried acknowledged that discovery as to overlapping issues is permissible.

You made an express representation to Justice Fried that NFL Enterprises LLC ("NFL") is not seeking any damages relating to the value of the NFL Network and, based on that representation, Justice Fried has decided that discovery relating only to the "current or aggregate" value of the NFL Network is not relevant. We will hold you to that representation and, in reliance on it, we agree with that ruling.

We also agree that Justice Fried acknowledged that discovery relating to "(a) the value of NFL Network programming during the time the August 11, 2004 and July 28, 2006 agreements were being negotiated, and as it relates to the

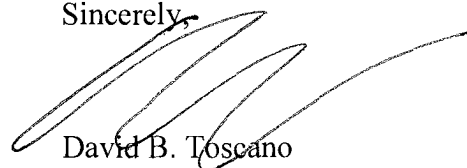
Patriots-Giants game of December 29, 2007, and (b) the value of individual affiliation agreements (e.g., net effective rates with individual affiliates)” is permissible. But we do not understand those two examples to exhaust the value-related topics that are properly subject to discovery in these actions. Indeed, we expressly explained, for example, the relevance of the value of the NFL Network’s programming after the July 2006 agreement, and Justice Fried did not decide that such discovery was off limits. Accordingly, we reserve the right to ask any question that is not palpably irrelevant to either party’s claims or defenses that does not solely concern the “current or aggregate” value of the NFL Network.

We disagree with the last paragraph of your letter. As set forth above, we agree based on your representation that discovery solely concerning the current or aggregate value of the NFL Network, including any alleged value of equity in the NFL Network, is off limits. But that is different from discovery regarding offers to share equity, regardless of its value, in a proposed transaction structure. Further, Comcast’s claims include violations of the MFN clause in the Affiliation Agreement, and if the NFL Network, for example, offered an equity interest to another distributor, that would implicate the MFN provision and be an appropriate topic of inquiry.

Finally, Justice Fried acknowledged the propriety of questioning regarding the NFL Network’s programming, and of questioning relating to Comcast’s incentives to tier the NFL Network – including related issues of pricing and distribution.

Despite the difficulty of agreeing to abstract bright lines, we are confident that, in light of Justice Fried’s guidance, the parties should be able to reach agreement on the proper limits of discovery in the context of concrete deposition questions.

Sincerely,

A handwritten signature in black ink, consisting of several fluid, overlapping loops and a long horizontal stroke extending to the right.

David B. Toscano

# Exhibit D

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X

NFL ENTERPRISES LLC,  
Plaintiff,  
-against-  
COMCAST CABLE COMMUNICATIONS, LLC,  
Defendants.

-----X

COMCAST CABLE COMMUNICATIONS, LLC,  
Plaintiff,  
-against-  
NFL ENTERPRISES LLC,  
Defendant.

-----X

HIGHLY CONFIDENTIAL  
VIDEOTAPED DEPOSITION OF STEPHEN BURKE  
Philadelphia, Pennsylvania  
Wednesday, January 21, 2008

Reported by:  
FRANCIS X. FREDERICK, CSR, RPR, RMR  
JOB NO. 20581

1 S. BURKE - CONFIDENTIAL

2 the governing contracts for those systems.

3 Q. Besides sort of the consumer

4 confusion, are there any other reasons --

5 well, strike that.

6 I think what you've mentioned is

7 there's the consumer confusion in switching

8 channels, and then there's the fact that

9 there's a lot of places you acquire networks

10 the first 60 channels or so may be already

11 filled up. Are there any other reasons you

12 wouldn't put your own ComCast content on those

13 channels?

14 MR. CARROL: I object to form.

15 And I'm going to let this go although it

16 has no connection to the New York suit.

17 But just note that in exchange for your

18 breadth of questioning here I expect to

19 have a similar accommodation when we're

20 questioning your witnesses. And I'll

21 take the breadth of your questioning now

22 as being a waiver of arguments you were

23 previously making that the questioning

24 should somehow be restricted to issues

25 in the New York proceeding.

1 S. BURKE - CONFIDENTIAL

2 MR. PHILLIPS: I think this is  
3 directly related to the New York  
4 proceeding and I'm happy to engage in  
5 that colloquy at some time when were not  
6 on this witness's time.

7 MR. CARROL: Oh, I'm not taking  
8 from your time and I've been quiet as a  
9 mouse all morning. In fact, I just have  
10 to say something so people will know I'm  
11 still here, Mr. Phillips.

12 I'm just putting you on notice  
13 that my silence you should take as  
14 recognition that by opening your  
15 questioning in the way you are you're  
16 not going to be in a position to insist  
17 on narrow questioning when I'm  
18 questioning your witnesses.

19 MR. PHILLIPS: Mr. Carrol, just  
20 one last word on this. The court has  
21 ruled the proper scope. I'm not waiving  
22 anything. This is well within in it.  
23 We can have this argument later.

24 BY MR. PHILLIPS:

25 Q. I'm sorry, Mr. Burke, but Mr.



# **Exhibit E**

1

SUPREME COURT OF THE STATE OF NEW YORK

2

COUNTY OF NEW YORK

-----x

3

NFL ENTERPRISES LLC,

4

Plaintiff,

5

-against-

6

7

COMCAST CABLE COMMUNICATIONS, LLC,

8

Defendants.

9

-----x

COMCAST CABLE COMMUNICATIONS, LLC,

10

Plaintiff,

11

-against-

12

13

NFL ENTERPRISES LLC,

14

Defendant.

-----x

15

16

January 23, 2009

9:40 a.m.

17

18

19

VIDEOTAPED EXAMINATION BEFORE TRIAL of

20

RONALD H. FURMAN, taken by Comcast Cable

21

Communications, LLC, held at the offices of

22

Davis Polk & Wardwell, 450 Lexington Avenue,

23

New York, New York, before Kathleen

24

Piazza Luongo, a Notary Public of the

25

State of New York.

1 FURMAN

2 identification.)

3 Q. Mr. Furman, could you tell us  
4 what this document that's been marked as  
5 Exhibit 18 is?

6 A. I'll read it first, please.

7 Q. Please.

8 MR. PHILLIPS: Note my  
9 objection to questioning on this  
10 document, Mr. Toscano.

11 This is the affidavit that Mr.  
12 Furman executed in the FCC proceeding  
13 and you know that under Justice  
14 Freed's order you are not to use this  
15 proceeding to conduct discovery for  
16 that proceeding.

17 MR. TOSCANO: Your objection is  
18 noted and I intend to limit my  
19 questions to overlapping issues  
20 relevant to this proceeding.

21 MR. PHILLIPS: I still have an  
22 objection to your questioning him at  
23 all on this and -- and if you're  
24 going to argue that I have waived the  
25 effect of Justice Freed's order I'm

1 FURMAN

2 not going to allow you to question  
3 him on it.

4 MR. TOSCANO: There will be no  
5 argument of waiver. This is simply a  
6 sworn statement of a witness which  
7 relates to the issues in dispute in  
8 this proceeding and I'm entitled to  
9 question him on it.

10 MR. PHILLIPS: Well, having  
11 noted my objection to it let's hear  
12 your questions.

13 CONTINUED EXAMINATION BY MR. TOSCANO:

14 Q. Mr. Furman, have had you a  
15 chance to review this exhibit? I  
16 apologize, I think we probably  
17 interrupted you.

18 A. I have for the moment but I  
19 reserve the right to go back and review  
20 it again.

21 Q. Please review it as often as  
22 necessary to make sure that you're  
23 testifying accurately.

24 I'd like to ask you about  
25 paragraph 2 in this -- oh, first of all,

1 FURMAN

2 could you tell us what this is?

3 A. A Declaration of Ronald H.

4 Furman in regard to my position at the

5 NFL Network responsible for sales of the

6 NFL Network advertising time.

7 Q. And this was prepared in

8 connection with papers that the NFL

9 submitted in an FCC proceeding; is that

10 correct?

11 THE WITNESS: Is the official

12 way to respond so that is it truly

13 just the FCC proceeding?

14 MR. PHILLIPS: It is.

15 A. I believe so, yes.

16 Q. I'd like to focus on the second

17 paragraph of your Declaration.

18 Would you please read that

19 paragraph starting with "Those

20 advertisers..."

21 MR. PHILLIPS: Objection.

22 Document speaks for itself.

23 Q. You may proceed.

24 A. Number two, "I have significant

25 experience with the process by which